IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE CITY OF BREMERTON, a municipal corporation, Respondent, v. WILLIAM SESKO and NATACHA SESKO, and their marital community, Appellants.	No. 33159-4-II (consolidated with 33261-2-II) UNPUBLISHED OPINION

QUINN-BRINTNALL, C.J. — The City of Bremerton obtained judgment liens for costs it incurred to abate the nuisance on William and Natacha Sesko's Arsenal Way and Pennsylvania Avenue properties in Bremerton.[1] The Seskos[2] challenged the lien amounts, asserting that they are incorrect because the City failed to properly credit and deduct the salvage value of items removed from the properties as per the court's earlier orders. The Seskos counterclaimed, arguing that the City damaged their properties while abating the nuisance.

[1] The City obtained a separate lien on each property; we consolidated the Seskos' appeals for review.

[2] We are aware that William Sesko passed away during the litigation of this case. We refer to the Appellants as the Seskos for clarity and intend no disrespect.

The trial courts below found the Seskos collaterally estopped from challenging the liens and entered judgment for the City. Because collateral estoppel does not bar the Seskos from litigating whether the lien amounts are properly calculated in accord with the trial court's earlier order, we reverse.

FACTS

The Seskos operated junkyards on their Arsenal Way and Pennsylvania Avenue properties. *City of Bremerton v. Sesko*, 100 Wn. App. 158, 160, 995 P.2d 1257, *review denied*, 141 Wn.2d 1031 (2000). The City of Bremerton ordered the Seskos to cease and desist this activity on both properties in 1995. Believing that the junkyard finding mischaracterized their property, the Seskos did not comply.

Arsenal Way Property

On January 30, 1998, the trial court issued an order declaring the junkyard on this property a nuisance and granted an injunction. The trial court ordered all of the property removed except for residential items. The Seskos appealed and this court affirmed that order on appeal. *Sesko*, 100 Wn. App. at 165.[3]

On December 15, 2000, the trial court entered an order authorizing the City and its contractors to immediately enter the Arsenal Way property and prepare for bidding to remove the property to abate the nuisance. In November 2001, the trial court issued orders clarifying its earlier orders permitting the City to enter and abate the nuisance. The Seskos appealed these orders, and this court affirmed the orders in an unpublished opinion. *City of Bremerton v. Sesko*,

[3] We held that collateral estoppel barred the Seskos from challenging whether their property was a nuisance. *Sesko*, 100 Wn. App. at 163-64. We also held that the trial court did not abuse its discretion by ordering unconditional abatement. *Sesko*, 100 Wn. App. at 164-65.

noted at 116 Wn. App. 1054 (2003), *review denied*, 150 Wn.2d 1036 (2004).[4]

The January 30, 1998 order and clarifying orders stated that the Seskos would be responsible for the charges incurred to abate the nuisance, but "[i]f any objects or vehicles on the property have salvage value, then the City of Bremerton *must credit the salvage value* of such objects against the charges imposed for the removal of goods." Clerk's Papers (CP) (#33159-4-II) at 20 (emphasis added).

On May 6, 2004, the City moved for entry of judgment liens for the costs of abatement. The Seskos challenged this motion, arguing that (1) the City was required to conduct sales of the Seskos' property under the statutory mandates provided for execution sales; (2) the City failed to properly credit the salvage value of removed items; (3) the City was required to give an accounting for removed items so that proper salvage credit can be assessed; (4) the City was barred by the doctrine of avoidable consequences from claiming the amount it did for the abatement; and (5) the City damaged their property during the abatement. The trial court ruled that the Seskos were collaterally estopped from challenging the liens and entered a judgment lien on the Arsenal Way property in the amount of $172,462.26. The Seskos appeal.

Pennsylvania Avenue

In a May 8, 1998 order, the trial court found that the Seskos' junkyard operations on the Pennsylvania Avenue property constituted a nuisance and ordered them to abate the nuisance. On the same day, the trial court entered a mandatory permanent injunction. And on appeal, this court

[4] We held that the clarifying orders were not appealable because they merely implemented the previous orders allowing abatement of the nuisance and that collateral estoppel barred the Seskos from relitigating the issue that the items selected for removal are not "junk" and challenging whether the operations on their properties constituted operation of a junkyard. *Sesko*, 2003 Wn. App. LEXIS 689, at *9.

affirmed the trial court's unconditional abatement order. *Sesko*, 100 Wn. App. at 165.

On December 15, 2000, the trial court issued an order clarifying the order permitting the City to unconditionally abate the nuisance and impose a lien on the Seskos' property to recover the costs of abating the nuisance, less any salvage value.

Once the City's contractors started the abatement process, the Seskos removed some of the items off of the property and then put them back onto the property. The City obtained more clarifying orders, which the Seskos appealed and this court upheld on appeal. *Sesko*, noted at 116 Wn. App. 1054; *City of Bremerton v. Sesko*, noted at 122 Wn. App. 1041 (2004).[5]

The City moved for entry of a judgment lien on March 3, 2005. The Seskos challenged this motion, making the same arguments listed above.

The trial court found that collateral estoppel barred the Seskos' objection to the entry of the judgment lien because the Seskos' objection was "identical to the previous unconditional abatement challenge." CP (#33261-2-II) at 611. Additionally, the trial court stated that even if collateral estoppel did not apply, the Seskos are "estopped from asserting any deficiency in the method, manner, time, and terms relating to the salvage value of [the Seskos'] property." CP (#33261-2-II) at 611. It reasoned that estoppel applied because "where an individual voluntarily relinquishes possession of collateral such that they no longer assert any interest in it and did not intend to bid on it, then that individual is estopped from claiming damages associated with its

[5] After the contractor removed property from the site, the Seskos put other property on the site. In 2003, the trial court granted the City an enforcement order authorizing it to enter the Seskos' Pennsylvania Avenue property and bring conditions into compliance with the 1998 order. *Sesko*, 2004 Wn. App. LEXIS 1727, at *8-9. We held that collateral estoppel barred the Seskos from challenging the enforcement order because that order only implemented the 1998 order and placed no additional restrictions upon the Seskos. *Sesko*, 2004 Wn. App. LEXIS 1727, at *10-11.

sale." CP at 612. It then held that items removed from the Seskos' property were collateral for purposes of offsetting the abatement costs and that the Seskos, after having been given ample time to abate the nuisance themselves, voluntarily relinquished any possession rights to the remaining property when the City entered and cleared the nuisance. Therefore, it ruled that the Seskos were estopped from claiming damages associated with the allegedly inaccurate credited amount.

On April 15, 2005, the trial court entered judgment for the City in the amount of $79,792.19. And the Seskos' timely appeal followed.

ANALYSIS

We address whether collateral estoppel bars the Seskos from challenging the amount of the judgment liens on their property.

Collateral Estoppel

The trial court's December 15, 2000 order clarifying judgment permitted the City to impose liens on the Seskos' property to recover the costs of abating the nuisance. It specifically required that "if any object, boat, or vehicle on the property has salvage value, then the City of Bremerton *must* credit the salvage value . . . against charges imposed for the removal of goods." CP (#33261-2-II) at 77 (emphasis added).

Arsenal Way

Originally, the Arsenal Way property cleanup bid was subtotaled at $94,970. This bid included a $138,970 base bid, $1,000 hazardous waste testing value, and a $45,000 salvage value credit. But the removable items' salvage value, as well as the amount of work necessary to abate the nuisance, decreased when the Seskos moved some items from the property. To remedy this

situation, the City recommended that "the base-bid of $138,970 remain unchanged and that salvage credit be based on actual salvage receipts provided by [Buckley Recycling Center, Inc.]." CP (#33261-2-II) at 405.

As of April 19, 2002, the City calculated the salvage credit at $18,824, but it expected that there would be more in the final stages of removal.

Buckley was paid $139,865 for its abatement work on this property. The trial court entered a judgment lien of $172,462.26 on the Arsenal Way property.

Pennsylvania Avenue

Originally Buckley's subtotal basic bid for the Pennsylvania Avenue property was $51,584. This included a base bid of $70,834, $750 hazardous waste testing value, and $20,000 salvage credit. The Seskos moved some of the items from the property. With fewer items to remove, the amount of work necessary to abate the nuisance decreased. In addition, according to the City, the salvage credit value decreased from $20,000 to zero. Because of this, the City reduced Buckley's base bid by $28,458 and it adjusted the original $20,000 salvage credit to zero.

A document titled "CONTRACT change order NO. 1" states that "[c]hanges in inventory adversely impacted salvage credit listed in original contract amount," increasing the contract amount by $16,277.31. CP (#33261-2-II) at 407. The work change order does not specify the parcel to which this increase attaches. The Seskos attribute this increase to the costs of abating the Pennsylvania property nuisance; the City does not contest this. We assume that it applies to the Pennsylvania property.

No salvage value was attributed to the property removed from the Pennsylvania Avenue property and, thus, no salvage value was credited to the Seskos.

The City paid Buckley $70,517.38. The trial court awarded the City this full amount in the judgment lien.

At the lien hearing, the Seskos argued that the City requested an incorrect amount because the City failed to credit the correct amount of salvage value as required in the trial court's earlier orders. The Seskos argued that the true costs of the abatement could not be determined and charged to them without an accounting of the removed items and deducting the salvage value of those items.

The trial court held that collateral estoppel barred the Seskos from raising these challenges to the lien amount.

We review de novo a trial court's determination that collateral estoppel precludes litigation of an issue. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). The doctrine of collateral estoppel prevents relitigation of issues that have already been decided by the courts. *Christensen*, 152 Wn.2d at 307. Collateral estoppel promotes the wise use of scarce judicial and court resources and prevents inconvenience of the parties within the court system. *Christensen*, 152 Wn.2d at 306-07. The purpose of collateral estoppel is not to prevent the parties from receiving a full and fair hearing on the merits of the issues to be tried but to provide finality when those parties have had a full and fair hearing in previous proceedings. *Christensen*, 152 Wn.2d at 306-07. The doctrine "is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation." *Christensen*, 152 Wn.2d at 306 (quoting *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967)).

Collateral estoppel applies in a subsequent proceeding to preclude issues litigated and

finally determined in the first proceeding. *Christensen*, 152 Wn.2d at 307.[6]

The party asserting that collateral estoppel applies bears the burden of persuading the court that the following elements have been met:

> (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen, 152 Wn.2d at 307.

If there is a doubt as to whether collateral estoppel applies, the issues should be resolved in favor of granting an opportunity to litigate the issue. Karl B. Tegland, 14A Washington Practice: Civil Procedure, § 35.33 at 480 (1st ed. 2003).

The City has not satisfied the first element of collateral estoppel because the issues litigated in the earlier proceedings are not identical to the issues raised in the current proceeding. Thus, collateral estoppel does not bar the Seskos from challenging the amount of the judgment lien.

The prior proceedings between the City and the Seskos addressed the method for calculating the cost of abatement. They did not and could not address whether the amount of the City's judgment after the abatement had been completed was properly calculated. Although related, the earlier litigation addressed only whether the items on the property were a nuisance and whether and how the City could abate that nuisance. *Sesko*, noted at 122 Wn. App. 1041; *Sesko*, noted at 116 Wn. App. 1054; *Sesko*, 100 Wn. App. 158.

[6] Res judicata bars the relitigating not only error issues that were litigated and resolved in the earlier proceeding, but also issues that could have been litigated and resolved. Karl B. Tegland, 14A Washington Practice: Civil Procedure, § 35.33 at 479 (1st ed. 2003).

Collateral estoppel precludes the Seskos from arguing that the City had no right to abate the nuisance on its property and also that the City is not entitled to recoup abatement costs. But collateral estoppel does not preclude the Seskos from arguing that the amount of those costs, as reflected in the judgment liens, was improperly calculated under the court's previous orders governing the abatement.

As stated above, the Arsenal Way property's modified contract provided that Buckley would abate the property for the original base bid price of $138,970, less the salvage value of the property removed, and that the salvage value would be established by receipts. The modified Pennsylvania property contract reflected the estimated zero value of the salvage on the property.

The Seskos claim that numerous items having salvage value were removed from both properties but that this value has not been attributed and deducted from the City's requested lien amount. The City argues only that the Seskos are collaterally estopped from challenging the claimed lien amount; it does not argue that it credited the Seskos with all of the salvage value. The amount the Seskos must pay the City for abatement of the nuisance on their property has not been previously adjudicated between the parties. Thus, collateral estoppel does not bar the Seskos' right to litigate this issue.

The Seskos are entitled to a hearing to determine the salvage value, if any, of items removed from their properties and a determination of whether the lien amount the City seeks is properly calculated under the trial court's earlier abatement orders.

To avoid any confusion on remand, we briefly address the trial court's alternative basis precluding the Seskos' claim in regards to the Pennsylvania Avenue property. Relying on *Commercial Credit Corp v. Wollgast*, 11 Wn. App. 117, 521 P.2d 1191, *review denied*, 84

Wn.2d 1004 (1974), the trial court found that even if collateral estoppel did not apply to prevent the Seskos from challenging the lien amounts, estoppel by abandonment did. According to the trial court, the Seskos' personal property subject to the abatement order was collateral for the purposes of offsetting the abatement costs. And the Seskos voluntarily relinquished any possessory rights to this property when they failed to correct the nuisance in the time specified by court orders. Because of this voluntary relinquishment, the trial court found that the Seskos were now estopped from claiming damages associated with the credited amount of salvage value.

But the abatement order specifically gave the Seskos the right to have the lien offset by any salvage value. Thus, the Seskos clearly have a right to assert that the amount of salvage value credited to them was deficient. Moreover, to the extent that the trial court implied that the Seskos abandoned their rights in the property, this is incorrect. Abandonment requires nonuse plus a showing of intent to relinquish. *Manello v. Bornstine*, 44 Wn.2d 769, 772, 270 P.2d 1059 (1954); *see also Shew v. Coon Bay Loafers, Inc.*, 76 Wn.2d 40, 50, 455 P.2d 359 (1969); *Turner v. Gilmore*, 50 Wn.2d 829, 831, 314 P.2d 658 (1957). Under the abatement order, the Seskos retained a right to salvage value. No intent to abandon that right has been shown here.

Damage Done During Abatement

The Seskos also sued the City claiming that it damaged both the Arsenal Way and Pennsylvania Avenue properties in the abatement process. They claim that collateral estoppel does not bar litigation of this issue. The Seskos have not properly presented this issue for our review. They set this claim out as one of a list of claims in their brief. This claim reads in its entirety: "***Damage to Property***: For recovery of an offset for the cost of repairing damage caused by the abatement contractor." Br. of Appellant at 32. The Seskos cite no authority and

provide no additional argument clarifying this issue. Thus, we are unable to address it further. RAP 10.3(a)(5); *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002) ("A party waives an assignment of error not adequately argued in its brief").

The Seskos' other arguments regarding (1) the proper procedures to be used when the City sells removed property to offset the costs incurred abating the nuisance and (2) the ultimate disposition of the removed property—i.e., whether the City can keep the property—are essentially arguments regarding whether the City properly credited and deducted from the lien amount the value of the removed goods and may be addressed on remand.

We reverse and remand for a determination of whether the City properly followed the court order that required deducting any salvage value must be deducted from the costs of abatement.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

HUNT, J.

VAN DEREN, J.